SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. BCD-25-275

PENQUIS C.A.P., INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellees.

APPEAL FROM THE BUSINESS AND CONSUMER COURT

APPELLANT'S BRIEF

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STATEMENT OF THE FACTS

The State of Maine Department of Health and Human Services ("DHHS") is an executive agency that, among other things, provides non-emergency transportation ("NET") services to and from health care appointments for individuals across eight distinct regions within Maine covered by MaineCare, Maine's Medicaid health insurance program. The Maine Department of Administrative and Financial Services ("DAFS"), through its Bureau of General Services, administers a system of competitive bidding for purchasing by State agencies, pursuant to 5 M.R.S. § 1825-A *et seq.* Penquis C.A.P., Inc. ("Penquis"), is a Maine non-profit corporation with a place of business and principal office in Bangor, Maine. As a community action agency, Penquis provides a variety of services to low-income Maine residents, including NET services. ModivCare Solutions, LLC ("ModivCare") is a for-profit, nationwide company based in Denver, Colorado, which also provides NET services.

Maine's NET program relies on a broker system that was created in 2013. A. 73. Maine's current NET system allows brokers to schedule and facilitate rides across the state with regional transportation providers, connecting Mainers in need of services with those transportation providers and reporting numerous performance and compliance metrics to DHHS each month. A. 73-74 (discussing the goals of the NET program); A. 84-85, 98-99 (outlining different reporting expectations for brokers). Maine's NET system is comprised of eight distinct geographic regions

throughout the state. C.R. 21,325. Penquis, Waldo C.A.P. ("Waldo"), and ModivCare are the only brokers currently serving the state of Maine and have been since this program's inception. A. 51. Penquis currently serves Regions 3 and 4. C.R. 542, Trans. 7:13-14. Waldo currently serves Region 5. *Id*. ModivCare currently serves Regions 1, 2, 6, 7, and 8. *Id.*

On or about May 15, 2023, DHHS issued a Request for Proposals ("RFP") that sought proposals to provide NET services within the eight distinct regions in Maine. A. 67-137; C.R. 726-796; C.R. 21,325. The RFP itself, and the competitive bidding process that it initiated, are governed by Chapter 110 of the Rules of the DAFS Bureau of General Services, Division of Purchases. 18-554 C.M.R. ch. 110;[1] A. 58-61. In response to the RFP, Penquis submitted four unique proposals, seeking contracts in Regions 2, 3, 4, and 8.[2] C.R. 444; Trans 110:22-25.

Four DHHS employees were appointed to review and judge each of the proposals submitted in response to the RFP. Melissa Simpson (formerly Fuller) ("Simpson"), Steven Turner ("Turner"), Richard Henning ("Henning"), and Roger Bondeson ("Bondeson") (collectively, "the Reviewers"). Individually and

[1] 18-554 C.M.R. ch. 110 as adopted pursuant to the Maine APA is provided at A. 58-61, C.R. 22,709-712. The rule as currently published and referred to by the DAFS "Division of Procurement Services" (https://www.maine.gov/dafs/bbm/procurementservices/policies-procedures/chapter-110) differs from the adopted rule in non-substantive ways.

[2] Region 2 encompasses most of Washington and Hancock Counties. Regions 3 and 4 encompass most of Piscataquis, Penobscot, Somerset, and Kennebec Counties. Region 8 includes most of York County and part of Oxford County. *See* C.R. 21,325.

collectively, the Reviewers were required to assess each application for each region on its merits and to decide which proposal ranked highest for each region. "State of Maine Guidelines for Proposal Evaluations and Consensus Scoring," C.R. 21,538-539 ("Guidelines"); 18-554 C.M.R. ch. 110, § 3(A); A. 58-61. The review process operated in two stages. In stage one, the Reviewers were required to review each individual bid region by region and then complete evaluation notes based on their individual reviews. C.R. 115-122, Trans. 54-61 (Roger Bondeson describing the review process); C.R. 21,456-459 (RFP Activity Schedule describing the process of RFP reviews); C.R. 21,538-539 (Guidelines). After each Reviewer completed their individual evaluations, stage two began. *Id.* In stage two, each Reviewer was required to participate in meetings to conduct collective evaluations of each regional proposal, and a team consensus evaluation note document was to be created for each bidder in each region. *Id.*

On October 5, 2023, Penquis was notified that it had not been awarded contracts for Regions 2, 3, 4, or 8 (the "DHHS Decision"). A. 42-43; C.R. 812-813. Instead, ModivCare was awarded contracts for the entire State of Maine. *Id.* Penquis timely submitted requests to stay contract negotiations pending its appeal, C.R. 21,725-739, and for an administrative appeal hearing pursuant to DAFS Bureau of General Services, Division of Purchases, Chapter 120. C.R. 21,756-770; *see also* 18-

554 C.M.R. ch. 120; A. 62-66.[3] On October 20, 2023, DAFS granted a stay of contract negotiations between DHHS and ModivCare. C.R. 21,870-873. On October 30, 2023, Penquis's request for an appeal was granted and consolidated with an appeal of Region 5's contract award filed by Waldo. C.R. 21,874-877.

In preparation its administrative appeal, in November and December of 2023, Penquis made four requests pursuant to the Freedom of Access Act, 1 M.R.S. § 400, *et seq.*, ("FOAA"), for public records relevant to the DHHS Decision that had not been produced by DHHS as part of the administrative appeal process. Among other things, Penquis sought emails between DHHS and ModivCare, as well as performance and compliance reports provided to DHHS by incumbent brokers, specifically ModivCare. C.R. 23,201-202, 23,204, 23,206, 23,208-209 ("the FOAA Requests"). DHHS produced some documents in January, which were subjected to heavy redactions, (the "January Productions") but did not fully respond in a timely manner to the FOAA Requests prior to the scheduled appeal hearing. Therefore, at the request of Penquis and Waldo (and with the consent of ModivCare and DHHS), the hearing was rescheduled to February 7 and 8, 2024. C.R. 21,900-902, 21,983. In January 2024, DHHS informed Penquis that it would not complete its production of public records prior to the appeal hearing. C.R. 22,027-029, 23,224-226. On January

[3] 18-554 C.M.R. ch. 120 as adopted pursuant to the Maine APA is provided at A. 62-66, C.R. 22,713-717 The rule in the form currently published and referred to by the "Division of Procurement Services" (https://www.maine.gov/dafs/bbm/procurementservices/policies procedures/chapter-120) differs from the adopted rule in non-substantive ways.

10, 2024, Penquis moved for a further continuance of the hearing to provide DHHS with additional time to comply with its FOAA Requests. C.R. 22,002-035. The State and ModivCare objected, and Penquis's request for a continuance was denied on January 23, 2024. C.R. 22,514-516.

On January 29, 2024, Penquis filed a Complaint in Superior Court pursuant to FOAA and a Motion for Preliminary Injunction to stay the hearing until DHHS had produced all of the records sought by the FOAA Requests. C.R. 22,518-556 (Verified FOAA Complaint and Motion for Preliminary Injunction); C.R. 23,100-235 (exhibits supporting Verified FOAA Complaint and Motion for Preliminary Injunction). On February 16, 2024, the Superior Court denied Penquis's Motion for Preliminary Injunction. The hearing was rescheduled to March 20, 21, and 22, 2024. C.R. 22,565. On the date of the hearing, DHHS had not produced all the records sought by Penquis's FOAA requests. DHHS's failure to fully produce the requested records materially impeded and frustrated Penquis' ability to prepare for and participate in the hearing on its administrative appeal.

The administrative appeal hearing was held on March 20, 21, and 22, 2024, via Zoom (the "Administrative Hearing"), over Penquis's objection. A. 46; C.R. 3. The hearing was held before a panel consisting of three Maine state employees, Gilbert Bilodeau, Douglas Cotnoir, and Michelle Johnson (collectively the "Appeal Panel"). A. 44-57. On April 24, 2024, the Director of the Bureau of General Services,

William Longfellow, published an eleven-page decision (the "Appeal Decision"). *Id.* The Appeal Decision upheld the contract awards to ModivCare in all disputed Regions. *Id.*

Penquis timely appealed the DHHS Decision to the Superior Court pursuant to Rule 80C of the Maine Rules of Civil Procedure, and the appeal was removed to the Business and Consumer Docket. As noted above and in its Verified FOAA Complaint, Penquis repeatedly sought the complete production of responses to its FOAA Requests as well as correction of the excessive redactions of the documents that were produced prior to the Administrative Hearing. *See* C.R. 23,162-163; 23,166-170. Only on July 27, 2024, months after the administrative hearing, did DHHS provide Penquis with its final, heavily redacted, FOAA response (the "July Production"). *See* C.R. 24,932-39,979. Of the 15,011 pages in the July Production, approximately five thousand (5,000) pages had not been provided in the records that were produced to Penquis in the January Productions. *See generally* C.R. 34,979-39,979. Many of the five thousand new pages in the July 27 Production, as well as many of the previously disclosed documents, were obscured by significant redactions, including dates, locations, senders, and recipients of emails. *Id.* Some documents were fully redacted, with no information available at all, making determinations regarding the extent of their relevance to the proceedings below

impossible.[4] Some documents that appeared to contain complaints about ModivCare's service had been so heavily redacted that the basis of the complaint was completely concealed.[5] Penquis worked diligently with DHHS to remove and reduce the number of unnecessary redactions throughout the administrative appeal, and into the 80C process. *See* C.R. 23,162-163; 23,166-170; 23,172-177. Ultimately, DHHS asserted that the redactions were necessary under HIPAA to protect MaineCare members' identities. C.R. 24,932. Pertinent federal regulations under HIPAA, however, plainly allow for the use of "qualified protective orders" to make sensitive information available to litigants in court proceedings. 45 C.F.R. § 164.512(e).

On September 25, 2024, the Kennebec Superior Court dismissed Penquis's FOAA Complaint in its entirety, holding that "Rule 80C and the APA appeal proceeding provided the exclusive procedure to remedy any due process violation that occurred during the proceeding before [the Bureau of General Services]." *Penquis C.A.P., Inc. v. Me. H.H.S., et al.*, No. CV-24-17, 2024 Me. Super. LEXIS 3,

[4] For example, C.R. 34,436-452, C.R. 34,453-486, C.R. 35,835-900, C.R. 35,901-36,032, C.R. 36,101-105, C.R. 36,136-241, C.R. 36,242-453, C.R. 36,565-566, C.R. 36,597-598, C.R. 36,599-602 are almost entirely redacted and contain large black boxes, making the limited information that was provided unusable.

[5] Examples of the substantial complaint redactions can be found at C.R. 36,114-118, C.R. 36,575-580, C.R. 36,649, C.R. 36,651-654; C.R. 36,655-658, C.R. 36,672, C.R. 36,680-681, C.R. 36,701-702, C.R. 36,711-712, C.R. 36,713-714, C.R. 36,715-717, 36,718-720. Notably, many of the complaints were sent directly to individuals at DHHS who would become the RFP Reviewers, such as Melissa Fuller and Roger Bondeson.

at *18 (Sept. 25, 2024). After the filing of the parties' briefs, the Business and Consumer Court held oral arguments via Zoom on May 12, 2025. *See* A. 7.

On May 23, 2025, the Business and Consumer Court issued its written decision, denying Penquis's 80C appeal in its entirety. A. 8-21. Penquis's timely Notice of Appeal to this Court followed.

STATEMENT OF THE ISSUES

I. Whether the State's refusal to allow Penquis to receive and review relevant FOAA documents prior to the Administrative Hearing violated Penquis's statutorily protected rights to a full and fair hearing.

II. Whether the Appeal Decision must be reversed because it was arbitrary and capricious, characterized by an abuse of discretion, and affected by errors of law.

III. Whether the Appeal Decision was unsupported by substantial evidence on the whole record.

SUMMARY OF ARGUMENT

The Appeal Decision must be reversed, and the contract awards must be invalidated, because the appeal process violated Penquis's statutory protected rights to a free and fair hearing on its appeal. Alternatively, the Appeal Decision must be reversed because it is unsupported by substantial evidence on the whole record, based upon unlawful procedure, is arbitrary and capricious, affected by errors of law, and is characterized by abuse of discretion.

ARGUMENT

I. Penquis was entitled to present any relevant evidence, and the State's refusal to await production of legible public records prior to the Administrative Hearing violated Penquis's rights to a full and fair hearing, undermining the Appeal Decision.

Penquis contends that the delayed, heavily redacted, public records produced in response to its requests, combined with the timing of the hearing and the preclusion of evidence, deprived Penquis of a fair appeal hearing under Maine statutes governing adjudication of competitive bidding disputes regarding state contract awards. Specifically, 5 M.R.S. § 1825-E (3) provides as follows:

> Members of an appeal committee appointed under this section shall meet at the appointed time and place in the presence of the petitioner and such individuals as the petitioner determines necessary for a *full and fair hearing*. The *petitioner may present to the appeal committee any materials the petitioner considers relevant* to the appeal.

(emphasis added). This language makes the appeal subject to the adjudicatory proceedings subchapter of the Maine Administrative Procedure Act, 5 M.R.S. ch. 375, subchapter 4, which in turn entitles Penquis to a hearing, *id.* §§ 8002(1) and 9051(2), at which it has the "right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying." *Id.* § 9056(2). Penquis had a right to a fair hearing and to present all relevant evidence to support its positions. Therefore, Penquis necessarily had to have access to public records with the potential to yield

relevant evidence, in order to test the assertions of state officials responsible for the award decision.

Penquis timely sought DHHS records that were relevant to the DHHS Decision. Penquis was not provided with those documents prior to the Administrative Hearing. *See* discussion *supra* 4-5. Furthermore, Penquis was only given access to substantially redacted versions of the requested documents on July 27, 2024, over *four months after* the conclusion of the Administrative Hearing. *See* C.R. 24,932. Despite repeated efforts by Penquis to address the insufficiency of the heavily redacted documents, DHHS never offered unredacted versions subject to a protective order, as is routinely done in a variety of adjudicatory contexts pursuant to federal rules allowing for the use of Protected Health Information without patient consent. 45 C.F.R. § 164.512(e)(1)(ii)(B), (iv), and (v). Given how well established this protective order mechanism is, there can be no explanation for the failure to constructively address the redaction issue other than an unwillingness to share relevant information with an aggrieved bidder.

Penquis made its requests under the authority of and pursuant to FOAA, and DHHS was required to produce the requested materials within a reasonable time. 1 M.R.S. § 408-A. The determination of what constitutes a reasonable time is considered on a case-by-case basis. In the context of records directly pertinent to a pending administrative appeal, a "reasonable time" must be within the time in which

the records would be relevant to that appeal, i.e., sufficiently in advance of the Administrative Hearing so that Penquis could have fully engaged with them, judged whether the production was complete, and utilized the production in the Administrative Hearing. Simply put, the State's actions, through DAFS and DHHS, denied Penquis the opportunity to present relevant evidence during the administrative appeal.

Appellees will likely claim that the Administrative Hearing statute within the Maine APA and FOAA are entirely separate schemes and that, therefore, DAFS was not required, nor should this Court consider, the relationship between Penquis's public records requests, the timing of the hearing, and the delayed and excessively redacted production of documents by DHHS. Maine law, however, recognizes that discovery is part and parcel of adjudicatory proceedings and allows agencies to adopt rules providing for discovery appropriate to the particular subject matter of their hearings. 5 M.R.S. § 9060 (2). While DAFS has never adopted any such rules, this does not mean that discovery is prohibited in procurement appeal proceedings. There are simply no agency-specific rules for how it is conducted, and no mechanisms for traditional discovery such as depositions and interrogatories. Instead, the practice in such appeals is for disappointed bidders to seek public records through FOAA and to use those records to determine whether there are grounds to challenge a contract award and, if so, as evidence of those grounds. Because DAFS retains control over

the timing of the hearing, agencies typically have an incentive to expedite the resolution of contract award disputes by expediting their responses to FOAA requests that pertain to a pending appeal. While no rules have been adopted to define or limit this practice, DAFS effectively fashions ad hoc procedures providing bidders with fair access to relevant information, exercising its inherent power to fashion procedures appropriate to the circumstances. As this Court has long held

> [i]t is a generally accepted principle of administrative law that administrative agencies, at least in the absence of specific legislative direction should be free to fashion their own rules of procedure. . . [and that] administrative agencies have the power, either impliedly . . . [or] statutorily conferred . . . to adopt rules of practice and procedure relative to the conduct of agency proceedings.

In re Maine Clean Fuels, Inc., 310 A.2d 736, 744 (Me. 1973)(internal quotation and citations omitted).

Penquis does not claim that FOAA establishes a specific time frame for an agency's production of public records. Instead, Penquis submits that a fair hearing was not provided because the agency holding the hearing, DAFS, refused to await the production of relevant information. The RFP itself establishes that internal DHHS records regarding past performance, if any, were relevant in selecting the winning bidders. The RFP General Provisions stated clearly that

> [b]idders will take careful note that in evaluating a proposal submitted in response to the RFP, the Department will consider materials provided in the proposal, information obtained through interviews/presentations

(if any), and *internal Departmental information of previous contract history with the Bidde*r (if any).

C.R. 733 (emphasis added). Thus, fairness in the appeal process required that bidders have access to the requested records in order to determine whether the scoring of the bids fairly reflected the performance records actually on file. Whether those specific records were or were not directly used by the Reviewers as they undertook scoring is not determinative of whether they might reveal errors in whatever summary of past performance was delivered to the Reviewers as they scored the bids.

At the Administrative Hearing, Bondeson testified that the Reviewers relied on his own personal knowledge and experience with the three incumbent bidders: Waldo, ModivCare, and Penquis. C.R. 142, Trans. 81:1-17; C.R. 178, Trans. 117:8-20.[6] While there was testimony that Reviewers did not directly examine internal DHHS documents, such as reports regarding the incumbent brokers' past performance that were requested as part of Penquis's FOAA Requests, it is undisputed that the Reviewers relied on Roger Bondeson's knowledge of the bidder's performance and abilities. C.R. 142, Trans. 81:1-17; C.R. 348-349, Trans.

[6] Roger Bondeson oversees the NET program for DHHS and incumbent bidders' required reporting. Bondeson testified that the Reviewers considered ModivCare's prior performance as an incumbent broker and ModivCare's COVID-19 transportation program during the individual reviews as well as the team consensus reviews. C.R. 142, Trans. 81:1-17; *see also* C.R. 161-162 (Bondeson stated that he was generally aware of incumbent bidders' past compliance with reporting requirements). When questioned about whether Reviewers were "obligated to consider prior experience [of incumbent brokers] as part of the RFP process," Bondeson stated, "I'm pretty sure we were obligated." C.R. 487, Trans. 153:7-18. When asked by counsel for Penquis if he "considered prior performance under the contracts as part of [his] assessment" Bondeson stated "Yes." C.R. 179, Trans. 118:1-3.

14:10-15:19. To understand whether Roger Bondeson's oral summaries of, in his words, the "totality" of past performance were an accurate reflection of reality, Penquis's only option was to review the records that memorialized each incumbent bidder's past performance and if necessary, to then question Roger Bondeson about the records and complaints. C.R. 232. Plainly, such documents were relevant and necessary to provide Penquis with a fair opportunity to challenge the contract awards to ModivCare.[7]

DHHS has denied Penquis's entitlement to less redacted versions of the requested records, claiming that the documents were confidential under HIPAA and other rules governing MaineCare records. *See, e.g.*, C.R. 24,932 (Citing variously to FOAA, 22 M.R.S. §§ 42(5), 1828, as well as HIPAA.). But, this authority, beyond its reliance on HIPAA, is unavailing: none of the Maine statutes cited by DHHS are more restrictive than HIPAA, and, more importantly, HIPAA itself provides a mechanism for litigants to have protected access to such information for the purposes of litigation.[8] Fair access could have been provided to these documents by that

[7] A governmental agency's failure to make documents that it relied on or should have relied on available to the parties appealing a decision prior to the hearing "runs afoul of the APA's requirements, constitutes legal error, and offends due process." *Pozzi, LLC v. Maine Bureau of Alcoholic Beverages*, No. BCD-APP-2023-00003, 2024 WL 673158, at *4 (Me. B.C.D. Feb. 05, 2024).

[8] The State's contention that the redactions are, in essence, legally required ignores other provisions of the HIPAA Privacy Rule that plainly permit the use and disclosure of protected health information in a number of circumstances, including disclosures for judicial and administrative proceedings, 45 C.F.R. § 164.512(e). This provision of the Privacy Rule defines "qualified protective order" for this purpose as an order that prohibits the parties from using or disclosing the information for purposes other than litigation or adjudicatory proceedings and requires the return or destruction of the information at the end of the litigation or proceeding. *Id*. § 164.512(e)(1)(v). Thus, the HIPAA privacy rule explicitly permits the use and

means, without releasing confidential information into the public domain. Moreover, Penquis, as a broker of NET services, is subject to exactly the same HIPAA requirements as the State with respect to the protection of personal data. A. 84, 94.

In conclusion, the documents related to ModivCare's prior performance are directly relevant to the issues raised in this matter, were requested by Penquis pursuant to FOAA, and Penquis was entitled to receive, review, and present such evidence at the administrative hearing. Because of the delay in DHHS's response to the FOAA request, coupled with the refusal of DAFS to continue the hearing, Penquis was deprived of the right to review and present evidence material to assessing the fairness of the competitive bidding process. This combined action of State agencies deprived Penquis of a reasonable opportunity to be heard on all of the facts relevant to its appeal. Therefore, the Appeal Decision must be reversed and remanded to afford Penquis the opportunity to review relevant documents.

II. The Administrative Record Compels a reversal because the Appeal Panel's Decision was arbitrary and capricious, characterized by an abuse of discretion, and affected by errors of law.

An administrative decision must be reversed when there is a showing that the agency abused its discretion. *See Seider v. Board of Examiners of Examiners of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 558; *see also Somerset Cnty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006, 1009. Furthermore, when

disclosure of protected health information subject to a protective order, without obscuring all identifying information.

evaluating administrative decisions, Courts "assess whether the adjudicator's decision was arbitrary or capricious based on the record before it." *Gordon v. Maine Comm'n on Pub. Def. Servs.*, 2024 ME 59, ¶ 11, 320 A.3d 449, 454 (quoting *AngleZ Behav. Health Servs. v. Dep't of Health and Hum. Servs.*, 2020 ME 26, ¶ 23, 226 A.3d 762, 768). "We will not find that an administrative agency has acted arbitrarily or capriciously unless its action is willful and unreasoning and without consideration of facts or circumstances." *Id*. It is well established that this Court is permitted to reverse or modify a decision of an administrative agency if the "administrative findings, inferences, conclusions, or decisions" were "[a]rbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(4)(C)(6). Indeed, the State's own procurement rules allow that a contract award decision, when arbitrary and capricious, may be invalidated. 18-554 C.M.R. ch. 120 § 3(2), A. 64.

An agency decision may also be reversed when it is "affected by . . . error of law." 5 M.R.S. § 11007(4)(C)(4). This statutory standard reflects a fundamental element of appellate review, in which the reviewing court has the authority to make independent judgments regarding interpretation and application of statutes and agency regulations making them specific, albeit with a measure of deference where the court detects ambiguities in the statutes or rules. *See*, *e.g.*, *Central Maine Power Co. v. Public Utilities Commission,* 2014 ME 56, ¶¶ 18-19, 90 A.3d 451, 458.

Here, two agency rules establish standards for conducting reviews of competitive bids and for hearing appeals of bid awards—and invalidating those awards if certain errors are found. These are duly adopted rules having the force of law, explicitly authorized by 5 M.R.S. § 1825-C. 18-554 C.M.R. ch. 110, A. 58-61, "Rules for the Purchase of Services and Awards," makes specific the competitive bidding requirements of *id.* § 1825-B, while 18-554 C.M.R. ch. 120 "Rules for Appeal of Contract and Grant Awards," A. 62-66, establishes specific appeal standards consistent with *id.* §§ 1825-E. Pursuant to Chapter 120, it is black letter law that a contract award must be invalidated if the process by which the award was decided violated the law. 18-554 C.M.R. ch. 120 § 2(B). The procedure for reviewing proposals submitted in response to a state agency RFP is set forth in Chapter 110. Hence, violations of Chapter 110 suffice by themselves to require invalidation of an award.

The rules described above have been in place without material changes since 1991. While the standards set forth in these components of Maine competitive bidding law are notably concise and often lack detail about how they are to be applied, the Division of Purchases, and its successor offices within DAFS, have elaborated on the interpretation and application of the rules in an extensive series of appeal decisions. These decisions have always been publicly available, and their significance in understanding the applicable law has been confirmed by the decision

of DAFS to publish the more recent decisions on a readily available website at the following URL: https://www.maine.gov/dafs/bbm/procurementservices/policies-procedures/appeals/appeal-hearing-decisions.

Consistent with the tendency of DAFS appeal committees to consider—and cite to—these decisions,[9] it is reasonable for this court to consider the lawfulness of the present decision against the backdrop of this body of administrative application of the relevant rules. *See, e.g.*, *Camden & Rockland Water Co. v. Maine Public Utilities Com'n,* 433 A.2d 1284, 1292-93 (Me. 1981) (the agency "must use methods . . . consistent with its construct" and "[we] must require that the Commission remain consistent in its application of . . . methods"). Other courts have elaborated on the value of prior administrative decisions as persuasive authority, as well as their

[9] Many of the DAFS appeal committee decisions themselves rely on—and cite as support for their holdings—other administrative agency appeal decisions, a facet of such decisions that the Appeal Panel in this matter chose to turn away from. *See In Re: Appeal of Award of Contract for Crisis Mobile Resolution and Stabilization Unit Services* (RFP #20150611) (2016), https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inline-files/Decision_RFP_201506114.pdf. at 5, 7; *In re: Appeal Award by the Public Utilities Commission for RFP #201106108, Next Gen 9-1-1 Services* (Apr. 20, 2012), https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inline-files/Decision_RFP_201106108.pdf, at 4; *In Re: Appeal of Award of Contract for Community Based Blindness Rehabilitation Services*, RFP 201602042 (Sept. 20, 2016) https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inlinefiles/Decision_RFP_201602042.pdf, at 5, *In the matter of Appeal of Second Award by the Public Utilities Commission for Next Gen 9-1-1 Services, RFP #201106108* (Second Bid Evaluation) (Nov. 9, 2012) https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inlinefiles/Decision_RFP_201106108_2nd.pdf, at 6; *cf*. A. 44-57. Courts have likewise recognized that prior administrative decisions can be considered. *See Gair v. Inhabitants of the Town of Eliot*, No. AP-05-037, 2005 WL 6013487, n.2 (Me. Super. Mar. 15, 2005) (stating that a prior planning board opinion interpreting an ordinance could be considered by the court "as being in the nature of 'precedent'; however, it is not binding on the court."). The differences between the Appeal Decision in this matter and the vast body of such decisions that predate this matter erodes the otherwise applicable presumption of regularity, a presumption that must be considered against the countervailing expectation that administrative decisionmakers must act with consistency and predictability.

importance in ensuring consistency and predictability in decision-making. The Massachusetts Supreme Court has held that

> [a] party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented. Davis, Administrative Law Treatise, §§ 17.01, 17.07, 18.01, and 18.02 (1958 and 1970 Supplement).

Boston Gas Co. v. Department of Public Utilities, 367 Mass. 92, 104, 324 N.E.2d 372, 379; *see also Alliance to Protect Nantucket Sound, Inc v. Energy Facilities Siting Bd.,* 448 Mass. 45, 55, 858 N.E.2d 294. The New York Court of Appeals, in a thoughtful opinion reviewing *stare decisis* in administrative contexts, concluded as follows:

> From the policy considerations embodied in administrative law, it follows that when an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.

In re Charles A. Field Delivery Serv., 66 N.Y.2d 516, 520 (1985)(citations omitted). *See Richardson v. Comm'r of N.Y. City Dep't of Social Services* 88 N.Y.2d 35, 40 (1996); *Cf. Lantry v. State,* 6 N.Y.3d 49, 58-59 (2005). In other jurisdictions, such as Vermont, courts have described consistent decision-making, treating "like cases alike," as a fundamental norm of administrative procedure. *See, e.g., In re Petition of Apple Hill Solar LLC,* 2019 VT 64, ¶ 25, 211 Vt. 54; *In re Stowe Cady Hill Solar, LLC,* 2018 VT 3, ¶ 21, 206 Vt. 430; *Westar Energy, Inc. v. FERC,* 473 F.3d 1239, 1241, 374 U.S. App. D.C. 256.

Here, the Appeal Decision is characterized by failures to invalidate the appealed awards in the face of violations of Maine competitive bidding rules, including requirements for the purchasing agency to provide substantive support for the scoring of bids, as well as uncontroverted evidence of other prescribed criteria for invalidating an award, including irregularities causing fundamental unfairness or arbitrary and capricious awarding of a contract. These errors of law are discussed more specifically below.

a. The Appeal Panel decision was affected by errors of law because it failed to enforce the agency rule requiring substantive information to support the numerical scoring specified in the RFP.

Throughout this administrative appeal process, Penquis has asked only that the State fairly and accurately apply its own rules and the law to the RFP review, the award, and, finally, the appeal process. The record clearly shows that the State failed

to do so. One of the key failures in this procurement exercise has been the scoring process and its documentation. DAFS' own procurement rules require that the purchasing agency must "document" the "substantive information that supports the scoring." 18-554 C.M.R. ch. 110, § 3(A); A. 60. The *Guidelines* used in this procurement plainly call for numerical scoring to be completed at the consensus stage. C.R. 21,538-539. Moreover, the RFP here explicitly commits to a numerical scoring process "on a 100-point scale" to be used in determining the award. A. 118; C.R. 777.

But, the team consensus notes simply recite a series of short observations about each proposal and then record the total points assigned to one of four sections, without noting what increases or decreases in scoring were contributed by a given observation, nor even stating the midpoint from which adjustments were made. *See, e.g.*, A. 209-218; C.R. 914-924 (team consensus evaluation notes for ModivCare's Region 3 proposal); A. 219-227; C.R. 925-933 (team consensus evaluation notes for Penquis's Region 3 proposal). Furthermore, at the Hearing, the Reviewers were unable to supply the missing explanations through testimony.

The testimony of Roger Bondeson and Steven Turner confirms that the Reviewers relied upon the consensus scoring system required by the RFP and contemplated in the *Guidelines*, issuing total scores for four separate sections. C.R. 121-122, Trans. 60:10-61:3, C.R. 233-234, Trans. 172:11-173:11, C.R. 440-441,

Trans. 106:19-107:5. Bondeson testified that final scoring was achieved by the Reviewers picking a number that is "roughly in the middle" of the total points available for a section if the bidder met that section's requirements, and the Reviewers would deduct or add from that midpoint depending on the Reviewers' view on that section of each proposal. *Id.* However, he admitted that he did not remember *what number* was awarded to bidders who met requirements. C.R. 121-122, Trans. 60:10-61:3. Indeed, throughout the Administrative Hearing, the Reviewers consistently stated that they awarded points and that those points determined the winning bidder, yet the Reviewers could not or would not explain how they arrived at any of the specific points awarded. C.R. 153, Trans. 92:5-6 ("I don't recall what items we noted that reduced the score by another two points."); C.R. 155-156, Trans. 94:22–95:25 ("I don't recall if that's where they lost two points or not . . . . So, I don't remember if that's where the extra two points came off or not . . . . I don't remember what weight that was given . . . . So, I just don't remember how that was scored as part of that section"); C.R. 242, Trans. 181: 4-7 ("I'm not going to score - - I'm not going to go through this what's this worth what's that worth because that's part of our consensus scoring. I just - - I don't know"). When questioned as to whether there was a methodology or system for how much weight was given to various subsections which comprised the overall sections' scores, a Reviewer responded "no." C.R. 457, Trans. 123:4-6. When Mr. Bondeson was asked

to translate a positive comment on a bidder's proposal into points, he stated that he could not. C.R. 247; Trans 186:2-8.

Later, a Reviewer discussed how points were awarded for overall sections as follows:

> typically, a member of the team will . . . suggest some number of points, and then there'll be discussion about, well, I think it should be -- you know, someone will give a higher number, a lower number, and then it's discussed, and -- and the team eventually agrees. And the evaluation process does not move on until that particular number is agreed upon.

C.R. 465; Trans 131: 2-19. Notably, this explanation, like others given by the purchasing agency's witnesses at the appeal hearing, points to nothing in the vendors' proposals nor any other information cognizable under the RFP as support for the scores assigned. Neither contemporaneous team consensus notes nor testimony at the Administrative Hearing provided any explanation of which facts or observations contributed to increases or decreases from the unstated, *approximate* midpoint as scores were assigned.[10] Simply put, there was no way for Penquis, or

[10] The only exception to this breathtaking absence of "substantive information that supports the scoring" was provided with regard to the other appellant from these contract awards, Waldo. Roger Bondeson was able to specifically point to the *exact subsection* of its proposal that caused Waldo to lose seven points (ultimately costing Waldo the contract award). C.R. 239-242, Trans. 178:13-181:17 (describing Waldo's loss of seven points). *Cf.* C.R. 152-153, Trans. 91:24-92:6 (stating that he did not "recall what items [the Reviewers] noted that reduced [Penquis's] score by another two points"); C.R. 155-156, Trans. 94:20-95:5 (stating that he did not remember if Penquis's response in a subsection reduced its score by "two extra points . . . or not").

the Appeal Panel, to know if the substance of the Penquis proposals, the format, both, or some unknown other factor contributed to its loss of the contract awards.[11]

The Appeal Decision erroneously brushes this violation of competitive bidding law aside, finding, without explanation, that the "information collected was sufficiently substantive." A. 53. The only information collected, however, described a pattern of behavior leading to consensus, without ever stating—or recording in reviewers' notes—any substantive basis for translating any of the notes into numerical scores. This was a plain and pervasive violation of the requirement in the competitive bidding law that an "agency shall document the scoring, substantive information that supports the scoring, and make the award decision." 18-554 C.M.R. 110.3(A), A. 60.

The requirement for substantive support is not negated by the choice to use a consensus process for evaluators to arrive at final scores. The requirement for substantive support remains fundamental to a fair competitive bidding process, reflecting what is necessary to establish that a methodical, consistent, and fact-based assignment of scores occurred. *See In Re: Appeal of Award of Contract for Crisis Mobile Resolution and Stabilization Unit Services* (RFP #20150611) (2016) at 6-9.

[11] When questioned at the Hearing, a Penquis employee testified that he could "not specifically" identify which subsections contributed to Penquis's gain or loss of points. C.R. 568, Trans. 33:17-19.

In the case at hand, Reviewers explicitly stated that they chose an arbitrary number to be awarded to a bidder that met expectations and then increased or decreased their score based on other positive or negative factors, but Reviewers could not recall what score was awarded for meeting expectations or how scores changed depending on undescribed positive or negative attributes of a bidder's proposal. *See* C.R. 465; Trans 131: 2-19. Ignoring this uncontested evidence that the Reviewers could not support the consensus scoring of the proposals, the Appeal Panel asserted—without describing any contrary evidence—that they did not consider this absence of supporting information a violation of the competitive bidding rules, A. 53-55, even though it is such a violation on its face. Under Chapter 120, this violation calls for invalidation of the award. 18-554 C.M.R. ch. 120, § 3(2)(A), A. 64. Thus, the Appeal Decision is affected by a fatal error of law and must be reversed.

b. The Appeal Panel's Decision was legally erroneous in that it failed to recognize disparate treatment of bidders as a violation of competitive bidding law.

The rule providing for appeals of contract awards, 18-554 C.M.R. ch. 120, A. A. 62-66, states that an award may be invalidated if the selection process was flawed by a violation of law or an irregularity causing fundamental unfairness. *Id.* 120 § 3(2), A. 64. Previous appeal panels have recognized that, even though reviewers may have the discretion to waive minor informalities within a proposal, "[d]isregarding

substantive requirements of the RFP, such as the implementation timelines, does not fall within this discretion" and is a violation of law with the meaning of Chapter 120. *See In the matter of Appeal of Second Award by the Public Utilities Commission for Next Gen 9-1-1 Services, RFP #201106108* (Second Bid Evaluation) (Nov. 9, 2012) at 5; *see also In Re: Appeal of Award of Contract for Community Based Blindness Rehabilitation Services*, RFP 201602042, (Sept. 20, 2016) at 5-6 (holding that evaluation of proposals was arbitrary and capricious and an abuse of discretion when proposals were not scored or evaluated consistently where one bidder did not submit required certificates but received the same score as a bidder who did submit the required certificates). Here, the Appeal Panel erred by failing to invalidate the award despite violations of law and irregularities causing fundamental unfairness in the procurement process.

First, when the Appeal Panel addressed ModivCare's COVID-19 Transportation contract with DHHS, it found that, in this special contract—and the favorable references to it in the scoring process—there was no evidence of any unfair advantage to ModivCare other than the Reviewers' positive notes about the program in their evaluations of ModivCare's proposals. A. 51-53. At the Administrative Hearing, however, uncontested evidence was adduced that the Reviewers considered ModivCare's brokerage of COVID-19 vaccine transportation services to the State of Maine, leaving positive comments on all eight of ModivCare's team consensus

evaluation notes and mentioning that it was a factor in their decision-making. C.R. 209-210, Trans. 148:10-149:20 (referencing C.R. 841, 873; A. 167); C.R. 449-450, Trans. 115:14-116:5; *see also* A. 210, 251, 293; C.R. 841, 873-874, 916, 957, 999-1,000, 1,043, 1,086, 1,130 (team consensus evaluations noting COVID-19 transportation).[12] DHHS did not allow any other incumbent bidders the opportunity to broker this program, and the team consensus notes did not acknowledge Penquis's work in a separate COVID-19 transportation program, choosing only to highlight ModivCare's COVID-19 transportation program. C.R. 209-211, Trans. 148:10-150:14 (referencing A. 167, 210, 251, 293; C.R. 841, 873-874, 916, 957, 999-1,000, 1,043, 1,086, 1,130); C.R. 558, Trans. 23:6-24 (referencing C.R. 14,549); C.R. 569, Trans. 34:6-9.

Despite this uncontroverted evidence, the Appeal Panel found that "[t]here was no evidence of any advantage to MODIV beyond the evaluators' notes of [the COVID-19 free Transportation Vaccination Program that] MODIV had performed" A. 52-53. This conclusion is directly contrary to the manner in which previous administrative decisions, such as *Crisis Mobile*, have applied and understood the

[12] During the hearing, two of the four Reviewers testified that they had considered ModivCare's COVID-19 transportation services as a positive contribution to ModivCare's scoring. C.R. 246-247, Trans. 185:23–186:1; C.R. 449, Trans. 115:8-24 (discussing C.R. 841); C.R. 450, Trans 116:1-9; C.R. 451-453, Trans. 117-19 (discussing C.R. 1,255, 1,357, 1,490, 1,623, 1,756, 1,889, 2,021, 2,153, which are Steven Turner's evaluations noting COVID-19 transportation); *see also* C.R. 450, Trans. 116:6-9 (Mr. Turner explicitly agreeing that he factored ModivCare's "free rides into [his] evaluation of [ModivCare's] proposals" for all eight regions).

standard for invalidating an award under Chapter 120. To contrast, in *Crisis Mobile*, an appeal panel held that "[w]hile testimony at the hearing suggested that some items were more important than others, it is fair to conclude that the Reviewers must have thought there was something significant about the items listed in order for them to make it onto the consensus scoring sheet at all." *In Re: Appeal of Award of Contract for Crisis Mobile Resolution and Stabilization Unit Services* (RFP #20150611) (2016) at 7.

Second, concerning ModivCare's failure to comply with contractual reporting requirements, the Appeal Panel found that

> [b]oth PENQUIS and MODIV have also been put under corrective action plans for various issues with performance in the past years under their current contracts. These plans called for actions and reporting. Testimony around the quality and completeness of MODIV's reporting was raised but the incomplete data was considered not significant by DHHS witnesses.

A. 51; C.R. 8. The record shows, however, that the previous contracts contained a provision such that failure to comply with reporting requirements was to be considered in future contract awards, and Roger Bondeson testified that he believed that the Reviewers were obligated to consider an incumbent bidder's prior performance. *See* C.R. 21,497, at § V.2; A. 74; C.R. 733 (RFP instructions stating "the Department will consider materials provided in the proposal, . . . and internal Departmental information of previous contract history with the Bidder (if any)"; *see*

also C.R. 179, Trans. 118:1-3 (Bondeson agreed that he had considered prior performance under the contracts); C.R. 487, Trans. 153:7-18.

The Appeal Panel ignored this evidence, and the Record contains no evidence to the contrary. Even more egregiously, the Appeal Panel failed to address the fact that ModivCare had not complied with reporting requirements for years—and was *still not in compliance* when its RFP proposals were submitted. C.R. 173-174, Trans. 112:11-113:23. By contrast, Penquis had improved its practices to comply with contract requirements immediately after being put under a corrective action plan. C.R. 560-561, Trans. 25:24-26:1; C.R. 562-63, Trans. 27:17-28:6.

III. The Appeal Decision must be reversed because it was unsupported by substantial evidence on the whole record.

This Court has the authority to reverse or modify an administrative agency's decision if the "administrative findings, inferences, conclusions, or decisions" were "[u]nsupported by substantial evidence on the whole record." 5 M.R.S. § 11007(4)(C)(5). When reviewing agency decisions, courts must examine "the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did." *Friends of Lincoln Lake v. Bd. of Envtl. Prot*, 2010 ME 18, ¶ 13, 989 A.2d 1128, 1133. Here, the Appeal Decision is not supported by substantial evidence on the whole record and must be reversed or remanded for further findings.

a. The substantial evidence supports a result contrary to that reached by the Appeal Decision.

There is ample record evidence that the award to ModivCare triggered each of the grounds for invalidation set forth in Chapter 120 § 2 of the rules governing appeals of contract awards. *See* discussion *supra* II.A-B. Moreover, the Appeal Decision is devoid of countervailing support for its ultimate finding that Penquis did not establish the grounds for invalidation of the Award. Because the Appeal Decision fails to marshal evidentiary support for the conclusions that it reaches, it must be reversed.

In fact, the combination of the numerous scoring discrepancies, scoring inconsistencies, and arbitrary scoring prove that the Appeal Decision was not supported by substantial evidence on the whole record. At the Appeal Hearing, Penquis proved by clear and convincing evidence that the review process violated the law, contained irregularities that created fundamental unfairness, and was arbitrary and capricious. While Reviewers also agreed that bidders "are entitled to a careful review of each individual bid" C.R. 455, Trans. 121:5-9, that "it is critical that each bid be reviewed on its own merits, individually" and that "each bidder is entitled to an independent and careful review of each bid", C.R. 427, Trans. 93:7-14, the Appeal Panel failed to acknowledge numerous deeply rooted issues with the review process that tainted the Appeal Decision.

Penquis presented uncontested evidence that the Reviewers failed to consider each of its proposals individually, even though Penquis carefully tailored its proposals fit the needs of each specific geographic region.[13] Instead, Reviewers copied and pasted their individual review notes from one of their reviews of a Penquis proposal to their other notes of Penquis proposals.

One of the Reviewers, Ms. Simpson, testified that she copied and pasted a significant portion of her evaluation notes for all four of Penquis's proposals, so much so that her evaluation notes for Penquis's proposals for Regions 3 and 4 were virtually identical, apart from only three subsections.[14] C.R. 415-423, Trans. 81:19–89:9. Similarly, Mr. Turner had nearly identical notes in his evaluation of Penquis's proposals for Regions 3 and 4 apart from four subsections between Regions 3 and 4 and three subsections in Regions 2 and 8. C.R. 445, Trans. 111:10-13; C.R. 447, Trans. 113:21-24; *see generally* C.R. 1,391-395; C.R. 1,523-527; C.R. 1,656-660;

[13] For example, while Penquis discussed the same qualifications and experience and use of the same call center across each region's proposals, bidders were required to tailor their proposals to fit unique attributes of each region, such as available subcontractors, relations with each region's native tribes, and the use of ferries. *See, e.g.,* C.R. 14,656, 15,058, 15,457, 15,845; *see also* C.R. 14,393, 14,796, 15,192-195, 15,578-581.

[14] Ms. Simpson admitted to copying her Region 2 note for Section C. Types of Transportation (C.R. 1,373) to her notes for Section C. Types of Transportation in Regions 3, 4, and 8 (C.R. 1,506, 1,639, 2,170, respectively), even though Penquis provided unique information (C.R. 14,546, 14,943-948, 15,342-347, and 15,730-734). She admitted to copying her Region 2 note for Section F. Regional Requirements and 7. Transportation Network (C.R. 1,341, 1,342-343) to her notes for those same sections in Regions 3 and 4 (C.R. 1,506-508), even though Penquis provided unique information (C.R. 14,557-560, 14,959-961, 15,770-782 and 14,581-593, 14,984-994, 15,382-392. Ms. Simpson also copied her Region 2 note for Section 28. Maine Federally Recognized Native Tribe Requirements (C.R. 1,381) to her notes for that same section in Regions 3, and 4 (C.R. 1,514, 1,646), even though Penquis, again, provided unique information (C.R. 14,656-657, 15,058, 15,457).

C.R. 2,187-191. When questioned about whether she felt that she thoroughly and accurately reviewed the proposals, Ms. Simpson agreed that she "probably could have done [a] better [job]" and that it "looked" as though she did not carefully or individually review each proposal. C.R. 425-426, Trans. 91:22–92:1; C.R. 427, Trans. 93:17-20. *In fact, Ms. Simpson agreed that this sort of cursory review of the proposals was "fundamentally unfair to the bidders,"* C.R. 427; Trans 93:15-24. Another Reviewer, Mr. Turner agreed that copying and pasting incorrect comments in multiple regions when the proposals provided different information would suggest a "mistake". C.R. 455-456, Trans. 121:25–122:7. Furthermore, when asked, Mr. Henning agreed that fairness required each bidder to "read every [individual regional proposal submitted by every bidder] word for word." C.R. 483, Trans. 149:2-17. Their agreement that these cursory approaches to the review were unfair is further supported by the RFP Activity Schedule and the reviewer instruction training videos, which required that the proposals be reviewed one at a time, independently of each other. C.R. 21,456-459. Based on the testimony of the Reviewers and the rest of the evidentiary record, Penquis proved that behavior during the proposal review process violated the law, as set forth in Chapter 110. 18-554 C.M.R. ch. 110; A. 58-61.

These were not the only instances of fundamentally flawed reviews of bidder's proposals. Three out of four Reviewers incorrectly noted that Penquis would not be using subcontractors in Region 4 and two Reviewers incorrectly noted

that Penquis would not be using subcontractors in Region 8, despite the three pages of information about subcontractors that Penquis included in its proposals for those regions. C.R. 448, Trans. 114:1-23 (referencing C.R. 1,656, 15,192-195); C.R. 473-476, Trans. 139:10–142:9 (referencing C.R. 1,650, 2,181, 15,192-195, 15,578-581); C.R. 423-425, Trans. 89:10–91:21 (referencing C.R. 1,637, 2,168, 15,192-195, 15,578-581). Additionally, Mr. Henning incorrectly noted that Penquis was working with certain Native American tribes in Region 3. C.R. 470-471, Trans. 136:8–137:13 (referencing C.R. 1,521, 15,058). But, Penquis made no mention of those tribes in its proposal for Region 3, as the tribes are not present within Region 3. *Id.* Penquis did, however, note that it would work with those tribes in its proposals for other regions, proving that Penquis's proposals were not independently reviewed, as required. *Id.* Ms. Simpson's reviews also copied her evaluation notes for the tribal relation subsection from one from Region 2 to Regions 3 and 4's notes, incorrectly noting the wrong tribes and explicitly saying "Region 2" within her notes for other Regions. C.R. 413-415, Trans. 79:14–81:21 (referencing C.R. 14,656-657, 1,381, 15,058, 1,514, 15,457, 1,646).

The unrefuted evidence clearly showed that the Reviewers failed to take the time to appropriately review proposals individually and according to the needs of

each particular region in Maine.[15] This fundamentally flawed review of the proposals constitutes a violation of the requirements of Chapter 110 and, hence, should have resulted in invalidation of the awards to ModivCare. 18-554 C.M.R. ch. 110, § 3(A); 18-554 C.M.R ch. 120, § 3(2)(A); A. 58-61. The Appeal Decision largely ignored this fatally flawed process, instead stating baldly that "[t]he information collected was sufficiently substantive to document the effort made by the reviewers and to support their scoring." A. 53.

Like the erroneous Appeal Decision itself, any efforts to defend the contract Award Decision discount the importance of the serious and widespread errors, omissions, and inconsistencies in the Reviewers' evaluations of the numerous, voluminous proposals that they were charged with scoring. A self-evident policy objective of the Legislature in providing both for competitive bidding and for a "full and fair hearing" of appeals from competitive awards, 5 M.R.S. §§ 1825-B and 1825-E, is to attract multiple vendors for goods and services required by the State, thereby securing the "best value" for taxpayer dollars expended. Vendors will not invest the time and money required to submit bids if they are not reasonably certain that their bids will be fairly and thoughtfully considered.[16] Thus, the tradition in

[15] In fact, Roger Bondeson testified that he did not score the qualification section based on the needs of the region, instead using a scattershot general standard, even though he confessed that there are "unique characteristics to the region[s]." C.R. 120, Trans. at 59:5-14.

[16] This principle was recognized by another Appeal Decision in 1996, wherein the Panel stated as follows:

> [I]n addition to creating grounds for unsuccessful bidders to attack contract awards, the rules established by the Bureau of Purchases serve an

Maine has been to recognize that errors and omissions in the scoring process require invalidation of an award, even if those errors have not been directly shown to change the outcome of the competition.[17] *See generally In Re: Appeal of Award of Contract for Lottery Gaming System and Services (RFP #200912565)* (2010), https://www.maine.gov/dafs/bbm/procurementservices/sites /maine.gov.dafs.bbm.procurementservices/files/inlinefiles/Decision%20RFP%2020 0912565.pdf, 7-8; *In Re: Home Counselors, Inc. Appeal of Contract Award of RFP #201911201 for Family Visitation Program* (2023), https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.pr ocurementservices/files/inlinefiles/Appeal_Decision%20RFP_201911201%20FIN AL.docx%20%281%29.pdf, at 7; *In Re: Appeal of Award of Contract for Crisis Mobile Resolution and Stabilization Unit Services* (RFP #20150611) (2016), 6-8.

> additional function: the safeguarding of the integrity of the government contracting process. *See Terminal Construction Corp. v. Atlantic City Sewer Authority*, 341 A.2d 327, 331 (N.J. 1975) ("Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good . . . . [A]ll bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where such practice may have played a part, will be set aside. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process.") Consequently, in view of this public interest served by the rules, the Panel finds that *the violation of the rules committed by the [the government agency] may not be excused because . . . it cannot be shown to have produced any harm*.

In re Appeal of Award of Enhanced 9-1-1 Services (1996), at 3 (emphasis added).

[17] This is particularly important in the case at hand, as the Reviewers repeatedly refused to explain how Penquis lost points within its Proposed Services Section, which ultimately led to ModivCare receiving the award of contracts in all eight regions. A. 42-43; A. 138-45.

Applying that principle, the substantial record evidence of multiple errors and omissions by the Reviewers compelled a finding that the evaluation process was affected by irregularities that were fundamentally unfair, *requiring* invalidation of the awards.

Other administrative appeal panels in Maine have held that a reviewer's failure to make individual evaluation notes was a violation of Maine's procurement law and was grounds for invalidating a contract award, even when a consensus scoring process was used. *In re: Appeal Award by the Public Utilities Commission for RFP #201106108, Next Gen 9-1-1 Services* (Apr. 20, 2012) at 3-5. Therefore, individual review notes were a foundational and essential part of the ultimate consensus scoring exercise, even though they were prepared before the scoring itself.[18] Thus, the Appeal Panel was required to invalidate DHHS's contract award, and its failure to do so is reversible error.

Simply put, there is no competent evidence that supports the Appeal Decision, and "the record compels a contrary conclusion." *Bischoff v. Board of Trustees*, 661 A.2d 167, 170 (Me. 1995). Because the record compels the conclusion that this procurement was flawed by multiple violations of law, irregularities creating

[18] Moreover, some team consensus notes were directly copied from the Reviewers' individual evaluation notes, such as Steven Turner's comments above ModivCare's COVID-19 transportation program, which stated "[a]t the Department's request during the pandemic [ModivCare] provided rides of any Maine resident who needed assistance in getting to a vaccination site . . . ." A. 167, 210, 251, 293; C.R. 841, 873, 916, 957, 999-1,000, 1,043, 1,086, 1130 (team consensus notes); C.R. 1,255, 1,357, 1,490, 1,623, 1,756, 1,889, 2,021, 2,153 (Steven Turner's individual evaluation notes).

fundamental unfairness, and arbitrary and capricious scoring, the Appeal Panel's failure to invalidate the Awards must be reversed.

CONCLUSION

For the reasons detailed above, Penquis respectfully requests that this Court reverse the Appeal Decision and remand to DAFS with instructions to invalidate the contract awards.

Dated: October 14, 2025

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Alfred J.F. Morrow, certify that, on the date indicated below, I the above to each of the parties listed below by electronic delivery, with delivery by U.S. Mail, first-class, postage-prepaid, addressed as listed below to be made at a later date:

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